IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O O C.J

Appeal No. 403 of 2005
in
Chamber Summons No.53l of 2005
in
Execution Application No.l8 of 2004
in
Hong Kong Action No.476l of 200l

Sumkin Bussan International
(Hong Kong) Ltd ..appellants
vs
King Shing Enterprises Ltd & anr Respondents

Mr Prateek Sekseria i/b Khaitan & Co for appellants
Mr N V Walawalkar with Mr.Prem J Ranga for responent no 2
Mr Praveen Samdani with Mr Birendra Saraf i/b DSK Legal and co for INC

CORAM: A.P.SHAH & S.J VAZIFDAR JJ.

Dated 27.6.2005

P.C:

l. This is an appeal from an order of the learned single Judge dated 20.4.2005 in Chamber Summons No 53l of 2005 staying the execution of a money decree. The appellant is the decree holder. The appellant has initiated execution proceedings against the property of the respondent no. 2 in Execution Application No.l8 of 2004. The warrant of attachment was levied upon the property of the respondent no. 2 on l2.l.2004. The warrant of sale was levied upon the attached property on 25.5.2004 and a public notice was issued on

20.4.2005 inviting offers for attached property. In the meantime, the respondent no. 2 was adjudicated as a bankrupt by the High Court of Singapore in Bankruptcy No B/4946/2004/C and vide order dated 4.2.2005 the Official Assignee was appointed as trustee of the respondent nos.2's estate. On l4.4.2005 the respondent no.2 moved the present Chamber Summons to stay the execution in view of the order of the High Court at Singapore in Bankruptcy suit. By the impugned order the learned single Judge has stayed the execution.

2. By consent of the parties the Chamber Summons itself was taken up for hearing on 6.5.2005 and arguments on the main issue were concluded. However,the matter was adjourned on the request of Mr Walawalkar, learned counsel for the appellant, to produce a copy of treaty between India and Singapore. Today Mr Walawalkar candidly stated that there is no treaty between India and Singapore on cross border insolvency. He, however, sought to rely upon UNCITRAL Model Law on Cross Border Insolvency. He fairly conceded that it is only model law and not a treaty and, therefore, it has no legal basis in India.

3. The only question is what effect is to be given by the Indian Courts to the adjudication order of a foreign court in competition with prior attachment of a decree in the Indian Court. On behalf of the appellants it was contended by Mr Dada that the adjudication order passed by the foreign court cannot be recognised and will have no effect of vesting in the Official Assignee any immovable property of the insolvent situated in India and the decree holder is entitled to the benefit of his prior attachment. On the other hand Mr Walawalkar contended that after the respondent no.2 has been adjudged as an insolvent, the decree holder is left with no remedy under the decree except that he can prove his debt before the Official Assignee at Singapore and the decree holder could not proceed with the execution application against the immovable property of the respondent no. 2 in India, since after the order of his adjudication as insolvent the property had vested in Official Assignee at Singapore. According to Mr.Walawalkar the attachment under the Code of Civil Procedure is purely prohibitory and does not operate to create any title, lien or security in favour of the attaching creditor,which according to Indian laws, would prevail over the Official Assignee appointed

in the insolvency proceedings and that it makes no difference that the adjudication order was made by the foreign court.

4. After hearing the learned counsel at length, we are of the view that the position taken by the learned counsel for the appellant is correct. The question is one of comity between two States and not one of municipal bankruptcy laws of either country. The rule of private international law is clearly laid down in Galbraith vs Grimshaw (l9l0 AC 508) that no adjudication order is recognised as having effect of vesting in the Receiver of any immovable property in another country. The reason for the rule is stated in the speech of Lord Macnaghten in Galbraith’s case (at page 5l2);

> " The Scottish Court(the foreign Court) can only claim the free asserts of the bankrupt. It has no right to interfere with any powers of an English Court pending at the time of the Scotch sequestration.It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt

> attached by the order nisi was at the date of the sequestration earmarked for the purpose of answering a particular claim - a claim which in due course would have ripened into a right. With this inchoate right the Scotish Court had no power to interfere, nor has it even purported to do so".

In an earlier passage Lord Macnaghten had said:

> "A creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think be deprived of the fruits of his diligence".

5. In Ananatapadmanabhaswami vs Official Receiver of Secunderabad and ors, AIR l933 PC l34 an order of adjudication was made by the District Court at Secunderabad in l928 adjudicating as insolvent the plaintiff in a partition suit in Madras High Court. The preliminary decree in a partition suit was attached in l926 by the decree holder against the plaintiff in execution of his decree. It was held by the Privy Council that the adjudication order was to be regarded as an order of the foreign court and that cannot be recognised as having effect of

vesting in the Receiver of any immovable property of the insolvent and the decree holder was entitled to the benefit of his prior attachment. The Court observed:

> " This means that, after the date of the foreign adjudication order, it will be recognised as effective, but it is equally clear from the opinions expressed in Galbraith's case, that it will not be allowed to interfere with any process at the instance of a creditor already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject matter of the process to the receiver...
>
> In the present case, at the date when the foreign adjudication was made, the Appellant was entitled to the benefit of this prior attachment of the decree in the Madras partition suit....
>
> In Galbraith's case, Lord Loreburn states the test as follows:

> "In each case the question will be whether the bankrupt could have assigned to the trustees at the date when trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have been assigned is situated in England, then the trustee may have it, but he could not have it unless the bankrupt could have himself assigned it".

6. In Dicey's Conflict of Laws, l0th edition, page 70l the rule is summarised as follows:

> " The fact that the debtor has been adjudicated bankrupt abroad does not necessarily mean that there are no available assets in England. In the first place, if he was adjudicated bankrupt in a country outside the United Kingdom, the English court might not recognise that the courts of that country had jurisdiction to adjudicate him bankrupt and even if they had the foreign order would not have any direct effect on immovables in England. In the second place, if the debtor was adjudicated

bankrupt in some other part of the United Kingdom, the English court could not question the jurisdiction of the Scottish or Northern Irish court, and the debtor's immovables as well as movables in England wold pass to the Scottish or Northern Irish trustee, yet even in this case, under the English doctrine of relation back and of the avoidance of certain past transactions made by the debtor there might be assets in England which could not be reached in a Scottish Ireland, and that from the situation of the debtor's property or other cause his estate and assets ought to be distributed under the bankruptcy law in Scotland or Northern Ireland" .

"As a general rule, all questions that arise concerning rights over immovable (land) are governed by the law of the place where the immovable is situated (lex situs). The general principle is beyond dispute and applies to rights of every description. It is based upon obvious considerations of convenience and expediency. Any other rule would be ineffective because in the last

resort land can only be dealt with in a manner which the lex situs allows".

7. Learned single Judge of Punjab High Court in Lakhpat Rai Sharma vs Atma Singh AIR l962 Punjab 228, following the decision in Privy Council in Anantapadmanabhaswami vs Official Receiver of Secunderabad held that where in an insolvency proceedings started in a foreign country an adjudication order is passed against the insolvent by the court of the country, it has no effect on the immovable property of the insolvent in India and consequently the property of insolvent situated in India can be proceeded against by the decree holder who has obtained a decree against the insolvent. Similar is the view taken by Calcutta High Court in re: Summermull Surana.AIR l932 Cal l24. In view of the facts of the case before us we do not find it necessary to express any opinion on the wider proposition laid down in those cases.

8. In the instant case the attachment was levied on l2.l.2004, i.e. much prior to the order of the High Court of Singapore adjudicating the respondent no. 2 as a bankrupt.The order of adjudication by Singapore High Court cannot affect the right of the attaching creditor of the insolvent.Consequently the Chamber Summons taken out by the respondent

no.2 is clearly not maintainable. The order of the learned single Judge granting stay to the execution is therefore vacated. The execution proceedings to proceed in accordance with law. We make it clear that our order will not prejudice the rights of the parties in Chamber Summons No 550 of 2005 and Chamber Summons No 3l8 of 2005 and the learned single Judge shall decide the same on their own merits.

. On the request Mr. Walawalkar the stay granted by the learned single Judge is continued for a period of six weeks.